Supreme Court, U.S.
FILED
NOV 17 1992
OFFICE OF THE CLERK

No. 92-678

In The

Supreme Court of the United States

October Term, 1992

THE BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF THE STATE OF CALIFORNIA, et al.,

Petitioners,

v.

PETE WILSON, GOVERNOR OF THE STATE OF CALIFORNIA; GRAY DAVIS, STATE CONTROLLER OF THE STATE OF CALIFORNIA; KATHLEEN BROWN, STATE TREASURER OF THE STATE OF CALIFORNIA; AND THOMAS W. HAYES, DIRECTOR OF THE DEPARTMENT OF FINANCE, STATE OF CALIFORNIA,

Respondents.

On Petition For Writ Of Certiorari To Court Of Appeal, State Of California, Third Appellate District

BRIEF IN OPPOSITION OF RESPONDENTS GOVERNOR PETE WILSON AND DIRECTOR OF FINANCE THOMAS HAYES

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QUESTIONS PRESENTED

1. Whether a modification of pension rights that bears a reasonable relationship to the successful internal operation of a pension system and which is accompanied by comparable new advantages violates the Contracts Clause of the Constitution.

2. Whether the California Court of Appeal properly determined that the provisions of chapter 83, Statutes of 1991, infringed no state contract rights.

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BRIEF IN OPPOSITION OF RESPONDENTS GOVERNOR PETE WILSON AND DIRECTOR OF FINANCE THOMAS HAYES

STATEMENT OF THE CASE

1. Factual Background

The Public Employers Retirement System (PERS) is the pension program for California state employees and for employees of local agencies who contract with the System. PERS is a defined benefits pension plan: employee benefits are defined and determined by statute.

PERS annuitants are guaranteed an annual cost of living adjustment (COLA) from 2 to 6 percent. Petitioner PERS Board of Administration is a statutorily created body charged with administering PERS.

In 1982 the California Legislature enacted the first of three programs which authorized the PERS Board, on a permissive basis, to augment the purchasing power of retired PERS members. These programs were known respectively as the Boatwright plan[1] (Cal. Gov. Code, § 21232), the Investment Dividend Disbursement Account ("IDDA", Cal. Gov. Code, § 21235), and the Extraordinary Performance Dividend Account. ("EPDA", Cal. Gov. Code, § 21238.)

There is in the Public Employees Retirement Fund (PERF) a statutorily created Reserve Against Deficiencies which is funded from interest earnings in excess of those credited to member accounts. The IDDA-EPDA and Boatwright programs and the allowances paid therefrom were funded through transfers of money from the Reserve Against Deficiencies (RAD). These transfers were predicated on legislative findings that the supplemental benefits could be funded without jeopardizing the actuarial soundness of the pension system. Pet. App. 30a-31a.

The legislation establishing those supplemental purchasing power programs required the PERS Board and the State Controller to inform recipients that these benefits were not cumulative, were not part of their base

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[1] For the sake of clarity and simplicity, respondents will adopt petitioners' usage and omit further reference to the Boatwright benefit. (See Pet., p. 5, fn. 3.)

allowance, and may be available for only a limited period of time. Cal. Gov. Code, §§ 21232(c), 21235(d), 21238(d).

The IDDA-EPDA benefits were not defined benefits, and they were not actuarially-based: i.e., they were not funded on an actuarial basis, and the funds set aside for these programs were not used either to determine the actuarial soundness of the retirement system or to determine the rate of employer contributions.[2]

While these plans provided some assistance to some retired pensioners, they were of only limited duration because their funding depended on the contingency of extraordinary investment returns; there was no actuarial basis for continued funding of the benefits. In a November 1990 report by A. Foster Higgins & Co., the PERS Board's consulting actuary, it was estimated that funding for these supplemental programs would be completely depleted within 6 to 10 years. Respondent's Exh. 1, p. 1.

The PERS consulting actuary also noted that the IDDA-EPDA program was unusual because

> ". . . in the private sector and in most public sector pension plans, there has always been a broad consensus that all excess investment earnings are appropriately used to reduce employer contributions."
>
> "The reasoning behind the conventional treatment of excess earnings is simple. The

---

[2] Higher employer contributions resulted from the supplemental purchasing power programs, however, because the funds set aside for these programs were not included in the calculation of employer contribution rates. See *City of Anaheim* v. *State*, 189 Cal.App.3d 1478, 1482-1483 (1989).

> employer makes a commitment to provide certain pension benefits, and the contributions it makes are fully affected by all plan experience – economic and demographic, and whether positive or negative. Employee contributions, if any, are fixed and are not affected by experience. Stated differently, the *employer* bears all the risk of adverse experience and, in return, receives the full benefits of any positive experience."

Exh. 1, pp. 20-21. Cf. *City of Anaheim* v. *State of California*, *supra*, 189 Cal.App.3d at 1482-1483.

Faced with an unprecedented fiscal crisis in 1991, the California Legislature enacted legislation which eliminated the IDDA-EPDA programs and substituted a new monthly supplemental retirement benefit which would provide retirees up to 75 percent of the purchasing power of their initial monthly retirement payments. The legislation provided that remaining funds in the former IDDA-EPDA accounts were to be transferred, until exhausted, to employer contribution accounts, to offset normal required employer contributions to the PERF. Cal. Stat. 1991, ch. 83. This legislation also transferred actuarial functions from the PERS Board to an independent actuary under a nonrenewable contract with the Office of the Governor. The Governor's nomination of the contract actuary is subject to legislative veto, and the contract actuary cannot serve successive terms. Section 42 of chapter 83 directs PERS employers to apply the savings from the use of IDDA-EPDA funds for the purpose of retaining or rehiring active PERS members who are otherwise subject to layoffs or reductions in their working hours. The Deputy Director of the Department of Finance estimated that, without the savings achieved through chapter 83, about

11,000 state workers would have been laid off. Dec. Suzanne Burton, Resp. Exh. 5.

On November 3, 1992, the California electorate approved Proposition 162, which, among other things, supersedes the actuarial provisions of chapter 83 and restores actuarial responsibility to the PERS Board. Opp. App. p. 1a.

ARGUMENT

I

THE COURT OF APPEAL CORRECTLY FOUND THAT MODIFICATIONS IMPLEMENTED BY CHAPTER 83 DID NOT CONTRAVENE THE CONTRACT CLAUSE BECAUSE, AS A FACTUAL MATTER, THE NEW BENEFITS WERE COMPARABLE TO THE OLD BENEFITS

The principal issue in this case is whether the Contract Clause of the United States Constitution precludes the State of California from replacing the IDDA-EPDA supplemental purchasing power programs with a comparable benefit program and using the funds from the IDDA-EPDA accounts to offset employer contributions to the retirement fund.

The United States Constitution prohibits any state from passing a law "impairing the obligation of contracts." U. S. Const., art. I, § 10. This provision has been held to apply to any enactment which carries the force of state law, including the state's own Constitution.

Not every change in a contract constitutes an impairment of the obligations of contracts, however. See *Stork* v.

State of California, 62 Cal.App.3d 465, 468 (1976) [133 Cal.Rptr. 207]. Nor does every impairment run afoul of the Contract Clause. This Court has observed,

> "Although the Contract Clause appears literally to proscribe 'any' impairment, . . . 'the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.' [Citation.] Thus, a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution."

United States Trust Co. v. *New Jersey*, 431 U.S. 1, 21 (1977) [52 L.Ed.2d 92, 109, 97 S.Ct. 1505]. An attempt must be made "to reconcile the strictures of the Contract Clause with the 'essential attributes of sovereign power,' . . . " *Ibid.* For example, "[m]inimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 245 (1978) [57 L.Ed.2d 727, 737, 90 S.Ct. 2716], fn. omitted.

The relevant principles have also been expressed another way:

> "The constitutional prohibition against contract impairment does not exact a rigidly literal fulfillment; rather, it demands that contracts be enforced according to their 'just and reasonable purport'; not only is the existing law read into contracts in order to fix their obligations, but the

> reservation of the essential attributes of continuing governmental power is also read into contracts as a postulate of the legal order. (*City of El Paso* v. *Simmons* (1965) 379 U.S. 497, 508 . . . ; *Home Building & Loan Assn.* v. *Blaisdell* [1934] 290 U.S. [398,] 428-429, 434-435. . . .) The contract clause and the principle of continuing governmental power are construed in harmony; although not permitting a construction which permits contract repudiation or destruction, the impairment provision does not prevent laws which restrict a party to the gains 'reasonably to be expected from the contract.' (*City of El Paso* v. *Simmons, supra,* 379 U.S. at p. 515. . . .) Constitutional decisions 'have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change.' (*Ibid.*; see 70 Dock. L.Rev. 524-34 (1966); 56 Colum. L.Rev. 251-270 (1956).)"

Allen v. *Board of Administration,* 34 Cal.3d 114, 119-120, Appeal Dism. 465 U.S. 1015 (1983).

Most cases brought under the Contract Clause turn on the existence and nature of the contract rather than upon a construction of the law which is said to impair it. *Indiana* ex rel. *Anderson* v. *Brand,* 303 U.S. 95, 100 (1938). The determination whether a contract exists, and its meaning, requires reference to state law. *Ibid.* When this Court is presented with a claim that a statutory scheme has created a contract, it will exercise independent judgment as to both the existence and meaning of the contract, but in doing so will grant deference to the decision of the highest state court which considered the matter unless that decision is "palpably erroneous" or "manifestly wrong." *Hale* v. *State Board,* 302 U.S. 95, 101 (1937)

[82 L.Ed. 72, 76, 585 S.Ct. 102]; *Phelps* v. *Board of Education*, 300 U.S. 319, 322-323 (1937) [81 L.Ed. 674, 677, 57 S.Ct. 483]. When both the existence of a contract and its terms have been determined by reference to state law, then it may be determined whether a subsequently enacted state law constitutes an impermissible impairment of contract under the federal Constitution.

In this case, the state Court of Appeal never determined whether any employees actually had vested rights in the IDDA-EPDA supplemental purchasing power programs, though the court held that only a limited group of employees – those who worked after January 1, 1989 before retiring – had even a colorable claim to such rights. The court *assumed*, for purposes of analysis, that this group had vested rights to IDDA-EPDA benefits (Pet. App. 20a), and it then explored and resolved associated factual questions in a manner which made further constitutional inquiry unnecessary. Operating under the assumption that this limited class of employees had a vested right to the IDDA-EPDA benefits, the court found that chapter 83 effected no unconstitutional impairment of vested contract rights because this legislation made only reasonable modifications to the Public Employees Retirement Law, while providing comparable new benefits. Pet. App. 20a-27a. This determination is consistent with the decisions of this Court and with controlling California law.

Under California law, public employee pension benefits are not viewed as absolute or immutable, even where they are clearly vested and contractual in nature. "Not

every change in a retirement law constitutes an impairment of the obligations of contracts, however. Nor does every impairment run afoul of the contract clause." *Allen* v. *Board of Administration, supra,* 34 Cal.3d at 119, citations omitted. Rather, modifications – even extensive changes – are permissible:

> "The rule permitting modification of pensions is a necessary one since pension systems must be kept flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy."

Kern v. *City of Long Beach,* 29 Cal.2d 848, 854-855 (1947); and see *Abbott* v. *City of Los Angeles,* 50 Cal.2d 438, 447-448 (1958); *Allen* v. *Board of Administration, supra,* 34 Cal.3d at 120.

The test for whether such pension modifications are valid is set forth by the California Supreme Court in *Allen* v. *Board of Administration, supra,* 34 Cal.2d at p. 131:

> "Such modifications must be reasonable, and it is for the courts to determine **upon the facts of each case** what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages. [Emphasis added.]"

Assuming, as the Court of Appeal did, that the elimination of the IDDA/EPDA programs was a modification affecting vested contract rights, the question is whether

the alterations were materially related to the theory of the pension system, and whether chapter 83 provided "comparable new advantages." Factually and legally, the decision of the Court of Appeal properly resolves this question against petitioners.

The Court of Appeal did not hold that a state's interest in "saving money," without more, is a sufficient basis for impairing contract rights. Quite the contrary, the court required *both* a theoretical justification for the changes in pension rights, related to the internal operation of the system, *and* a factual showing that any resultant disadvantage to employees is accompanied by comparable new advantages:

> "The saving of public employer money is not an illicit purpose if changes in the pension program are accompanied by comparable new advantages to the employee. If that were not the case the reasonable modification doctrine would add little flexibility to the administration of the public pension systems. The 'material relation' requirement fulfills 'the purpose of keeping the pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. . . .
>
> ". . . .
>
> "*Wallace* and *Allen* show that considerations external to the functioning of the pension system, such as increased taxpayer hostility to felons or jealousy of employees not covered by the system will not justify a change. The justification must relate to considerations internal to the pension system, e.g., *its preservation or protection or the advancement of the ability of the employer*

> *to meet its pension obligations.* Changes made to effect economies and save the employer money do 'bear some material relation to the theory of a pension system and its successful operation. . . . ' (*Betts* v. *Bd. of Administration, supra,* 21 Cal.3d at p. 864.) *That is not to say that a purpose to save the employer money is a sufficient justification for change. The change must be otherwise lawful and must provide comparable advantages to the employees whose contract rights are modified. We hold only that, the monetary objective will not invalidate a modification which is otherwise valid."* (Emphases added.)

The court below clearly took pains to fashion a limited holding which was consistent with prior decisions restricting the application of the reasonable modification doctrine. This decision clearly requires public entities to show more than a desire to save money before they can justify changes in pension laws. Furthermore, contrary to petitioners' assertions, the decision breaks no new ground regarding permissible pension modification. Under California law, fiscal considerations can be used as a basis for justifying changes in pension plan benefits. *Allen* v. *Board of Administration, supra,* 34 Cal.3d at 125. Indeed, it is patently absurd to argue, as petitioners do, that the continued solvency of the employer is immaterial to the continued vitality of the pension system.

Petitioners erroneously assert that the Court of Appeal's decision "impermissibly compresses" constitutional inquiry by omitting any inquiry into the "necessity" for the modification of pension benefits. Their claim wrongly assumes that a reasonable modification with

comparable new advantages is tantamount to an impairment of contract rights. This is not the case. Pension rights are created *subject to* the reasonable modification doctrine.

Even if reasonable modifications were to be construed as contract impairments, a detailed inquiry into the necessity of chapter 83 was not required here because the existence of the State's $14 billion dollar budget shortfall, and the State's overriding interest in closing this shortfall, were never seriously contested or challenged in this case. Given the context of this case, it is fanciful to argue that the *Claypool* decision modified the existing *standard* for measuring the constitutionality of impairments of contract obligations – a proposition that was never presented to the court and was not decided by the court. Rather, petitioners' challenge, there and before this Court, is more simply a dispute about the *factual propositions* (1) that chapter 83 was materially related to succsesful operation of the pension system, and (2) that elimination of the former IDDA-EPDA programs was accompanied by comparable new advantages.

To be sure, petitioners fault the Court of Appeal's analysis of the comparability of the old and new benefits. However, the comparability issue is essentially a factual question determined by the Court of Appeal in its exercise of original jurisdiction after considering extensive expert testimony on the subject. There is ample evidence in the record below to support the court's factual determination that the new benefits were indeed comparable to the old benefits.

Chapter 83 replaced the nonvested, temporary, discretionary, funded-by-chance IDDA/EPDA programs with a *vested* purchasing power protection program (PPPP), as set forth in newly added Government Code section 21235.5. The new program thus provides a guaranteed annual funding source,[3] while IDDA/EPDA adjustments were "funded" only when and if the investment market produced unexpectedly high earnings. And this new program provides for funding every year, permanently into the future, while the IDDA-EPDA reserves would have dried up completely in a matter of 6 to 10 years. A. Foster Higgins & Co. Report at p. 016, Resp. Exh. 1. Not only did the PPPP eliminate the contingent nature of the IDDA-EPDA benefits, but respondents' evidence further showed, with expert actuarial analysis, that the PPPP benefits equaled or exceeded the IDDA-EPDA benefits under various projected economic scenarios.[4] See generally 1st Bleakney Decl. at ¶ 5.10 et seq., Resp. Exh. 6

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[3] Further funding for the AB 702 PPPP is provided under section 29.5 of the bill, which added Government Code section 20652.5. Section 20652.5 reduces (prospectively) to 6 percent the interest rate credited on accumulated contributions for members who withdraw their contributions before qualifying for retirement. Section 20652.5 then provides for transfer to the PPPP of "[t]he interest amount which would have been otherwise credited to the member's account on or after the effective date of this section, but for the return of the member's accumulated contributions." See also Bleakney Decl. at ¶ 5.10, Resp. Exh. 6.

[4] A central irony in this case, ignored in the petition for writ of certiorari, is the fact that the PERS Board itself proposed complete elimination of the EPDA increases – and redirection of the accumulated IDDA-EPDA funds – as a way to address the fiscal crisis facing the State. Resp. Exh. 7, Objective No. 1.

and 2nd Bleakney Decl., Resp. Exh. 13. Although specifically requested by the Court of Appeal to compare the impact of the new mandatory second tier retirement program for new state employees on projected PPPP and IDDA-EPDA benefits, the petitioners below and the PERS Board (petitioner here) either declined to submit that evidence on this matter or submitted only sketchy evidence. Pet. App. 24a-25a and fn. 4 at p. 25a. Respondents submit that the failure of the petitioners and the PERS Board to avail themselves of the opportunity presented to them by the Court of Appeal precludes them from now relitigating this matter in Certiorari proceedings and from challenging the Court of Appeal's analysis of this complex factual question.

In any event, there is substantial evidence in the record to support the Court of Appeal's determination that the chapter 83 PPPP benefits are comparable to the repealed IDDA-EPDA benefits. Both IDDA and the PPPP use 75 percent of initial purchasing power as the standard for triggering pension increases, but – contrary to petitioners' assertions – IDDA was the relatively "illusory" benefit. As noted above, IDDA conferred no vested rights, had no guaranteed funding, was subject to the PERS Board's discretion, and would very probably have run out of monies in 6 to 10 years in any event. The PPPP, in contrast, is a permanent program with guaranteed funding sources; moreover, it confers upon members a vested contractual right to benefits. It is thus an *improvement*, not merely a comparable advantage (Bleakney Decl. at ¶¶ 5.70-5.72, Resp. Exh. 6), and it plainly "relate[s]

generally to the benefit that has been diminished." *Betts* v. *Board of Administration*, 21 Cal.3d 859, 864-865 (1978).

Petitioners argue that the PPPP benefits are obviously below the level of the repealed EPDA program, which authorized additional increases up to 80 percent of initial purchasing power, *provided there were sufficient funds to pay IDDA benefits*. Petitioners' insistence on strict numerical equality is not supported by the law, and ignores essential distinctions between IDDA/EPDA and the new program. A modification is permissible so long as there is *general comparability* of advantage; the doctrine would be meaningless if the Legislature were required to reinstate precisely the same program it repealed. EPDA opened the possibility that some increases in excess of 75 percent might be paid if the market generated extraordinary interest earnings and if the administrators determined that such increases were appropriate. But there was no vested right to such increases, and there was no guarantee that such increases would be paid out, as reflected in the PERS Board's express willingness to discontinue EPDA payments after January 1992.[5] See PERS Bd. Pres. 6/17/91 letter, Objective No. 2, Resp. Exh. 7. And, once again, PERS consultants estimated that, in any event, the monies available for such payments would be exhausted within 6 to 10 years. Resp. Exh. 1 at p. 016.

Petitioners may not concede that the permanent funding and vested right conferred by the PPPP are

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[5] It should be noted that payments under EPDA were not even authorized before January 1, 1991 (Gov. Code, § 21238(b)), and that only one EPDA payment was ever made. Lund Decl., Petitioners' Exhs. at p. 154.

improvements over the short-term, ad hoc EPDA program, but it is irrefutable that the PPPP creates, at the least, a comparable new advantage. Bleakney Decl. at ¶¶ 5.70-5.72, Resp. Exh. 6.

There is another distinct new advantage created by AB 702 which should be considered in the comparability analysis. Under section 42 of the bill, PERS members who are subject to layoff or reduction are afforded protection with respect to employers' expenditure of savings flowing from repeal of the IDDA/EPDA programs:

> "In expending any savings which accrue to [PERS] employers as a result of the repeal of the retirement allowance adjustment programs established pursuant to Sections 21235, 21236, 21237, and 21238 of the Government Code, the state, school districts, cities, counties, local districts, agencies, and any other [PERS] employers, shall give the highest priority to retaining or rehiring as many as possible of those [PERS] members subject to layoff or reduction."

This addition advances the twin purposes of protecting the very livelihoods of current PERS members and ensuring their continued participation in (and contributions to) the fund.

Neither the retirement system nor its membership are well served by massive layoffs and staff reductions among member employers. Current, active employees are members and beneficiaries of the system as much as retirees are, and the protection afforded by section 42 of chapter 83 is indeed a new advantage which benefits them and which must be assessed in determining comparability – at least to the extent

that current employees, and/or their unions on their behalf, purport to challenge the Legislature's actions concerning the IDDA/EPDA programs and accounts.

II

THE TRANSER OF IDDA-EPDA FUNDS TO ACTUARIALLY FUNDED RETIREMENT PROGRAMS VIOLATES NO CONTRACT RIGHTS AND DOES NOT INVOLVE ANY FEDERAL QUESTIONS

Petitioners urge this Court to review the lower court's determination that the provisions of chapter 83 for the transfer of IDDA-EPDA funds to the PERF, to be credited against employer contributions, do not violate the provisions of the California Constitution declaring PERF assets to be held in trust. Pet., pp. 19-22. The trust provisions of the California Constitution, by themselves, involve no federal questions. However, Petitioners contend that the trust provisions implicate contract rights because they were enacted in response to a 1982 attempt to use funds from the RAD to offset employer contributions. The same Court of Appeal which decided the *Claypool* case held the 1982 legislation to be an unconstitutional impairment of contract rights in *Valdes* v. *Cory*, 139 Cal.App.3d 773 (1983). Petitioners allege that certiorari review is necessary because the Court of Appeal misunderstood and wrongly applied its own *Valdes* decision in this case when it held that the fund transfer provisions of chapter 83 violated no contract rights. This argument is without merit, and certiorari should not be granted to review this issue because the state law issues were properly decided below. The fund

transfer provisions of chapter 83 raise no federal questions.

It is not the Court of Appeal but petitioners who have misinterpreted *Valdes* and who have failed to read it in its proper factual context. In *Valdes* there was only a limited record on the actuarial impact of the transfer of funds from the RAD to offset employer contributions, and the *Valdes* court invalidated the transfer because it was unable to determine whether the transfer impaired PERS members' implied contractual right to the actuarial soundness of PERS. *Id.* at 786. In this case, on the other hand, the legislative history of the IDDA fund, which contains actuarial findings that the IDDA fund could be created without impairing the financial integrity of the PERF, and the actuarial evidence presented by the parties – as well as the unique status of the IDDA-EPDA funds in the PERF – form the factual basis for the *Claypool* court's legal and factual determination that the use of these funds in lieu of general fund contributions posed no threat of impairment of members' vested rights in the security and integrity of the PERF and did not impinge on their right to the systematic funding of the PERF. Pet. App. 27a-31a.

The *Claypool* court's decision upholding the transfer of the IDDA-EPDA funds is based on a different record, on different facts, and on different statutes than the *Valdes* court's decision. The court's opinion here does not conflict with prior California decisions on the subject, and it is not an attempt to use state law to insulate Contract Clause claims from review by this Court. Certiorari should be denied for want of jurisdiction because

the redirection of IDDA-EPDA funds impaired no contract rights and raises no federal questions.

III

THE TRANSFER OF ACTUARY POWERS FROM THE PERS BOARD IS NOT A FEDERAL QUESTION, AND IS NO LONGER JUSTICIABLE IN ANY EVENT

Petitioners further argue for certiorari on the ground that chapter 83's transfer of actuarial responsibility from the PERS Board to an actuary appointed by the Governor unconstitutionally violates the putative contract right of California employees and retirees to have the PERS Board exercise actuarial duties for the System. Pet. pp. 22-25. This argument presents no legitimate federal question and, in light of the passage of Proposition 162 on November 3, 1992, the issue which it addresses is now moot.

Certiorari is unnecessary to review this issue because the Court of Appeal correctly applied California law to find that the Legislature had the power to transfer actuarial functions from the PERS Board to an actuary appointed by the Governor. This issue raises no federal contract clause question because, under the Constitution, the state has absolute power to create and modify subordinate agencies and offices.

This Court has consistently held that "the legislative power of a State, except so far as restrained by its own constitution, is at all times absolute to all offices within its reach. It may at pleasure create or abolish them, or modify their duties . . . (citations omitted)." *Higginbotham* v. *Baton Rouge*, 306 U.S. 535, 538 (1938). In California, the Legislature may exercise its legislative powers in any

manner which is not expressly or by implication limited by the California Constitution. Constitutional limitations on the legislative power are construed strictly, and are not to be extended to matters not covered by the language used. *Pacific Legal Foundation* v. *Brown*, 29 Cal.3d 168, 180 (1981); *California State Employees' Association* v. *State of California*, 199 Cal.App.3d 840, 845-846 (1988).

The PERS Board of Administration is a creature of statute, not of the Constitution, and when chapter 83 was enacted the Legislature had plenary powers over the Board and could confer upon it, or revoke or transfer from it, such powers as it saw fit. *Metropolitan Water District* v. *Whitsett*, 215 Cal. 400, 407 (1932). Thus the actuarial provisions of chapter 83 were properly found to be a valid exercise of legislative power and to have impaired no contract rights.

In any event, the question of the validity of chapter 83's transfer of actuarial powers from the PERS Board to a contract actuary is now moot because of the passage of Proposition 162 in the November 3, 1992 statewide general election. Proposition 162 amended section 17 of article XVI of the California Constitution to add subdivision (e), which provides:

> "(e) The retirement board of a public pension or retirement system, consistent with the exclusive fiduciary responsibilities vested in it, shall have the sole and exclusive power to provide for actuarial services in order to assure the competency of the assets of the public pension or retirement system."

Proposition 162 is effective immediately upon certification of the official canvass by the Secretary of State. With

the passage of Proposition 162, the provisions of chapter 83 regarding the transfer of actuarial powers have effectively been repealed, and there is no longer a justiciable controversy over their transfer from the PERS Board. The matter is moot[6]. *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974).

IV

THIS CASE RAISES NO FEDERAL ISSUES OF GENERAL IMPORTANCE THAT WARRANT REVIEW BY THIS COURT

Petitioners' final attempt to persuade this Court to grant review in this matter is a claim that review is necessary to resolve "issues of general importance" regarding the modification of public employee pensions. These issues revolve around the disparate approaches of the States in their treatment of the pension rights of public employees. However, any diversity that exists among the states in their treatment and characterization of the pension rights of public employees is the product of federalism and the freedom of the States to enact their own laws. This diversity in and of itself raises no federal questions because the Contract Clause is not a vehicle for establishing a federal common law of contracts.

The diverse state treatments of pension rights are proper in our federal system. They present no federal questions, and hence provide no jurisdictional basis for this Court to grant review in this case.

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[6] Although the Governor nominated a contract actuary, the Legislature never approved the Governor's nomination, and no actuarial rates were set pursuant to chapter 83.

CONCLUSION

The California Court of Appeal properly determined that the provisions of chapter 83 reasonably modified the existing supplemental puchasing power programs, impaired no rights under state law, and were reasonably related to the theory and operation of PERS. Since these modifications impaired no contract rights, they present no federal question warranting review by this Court. The remaining issues presented in the petition were properly resolved according to state law, and likewise raise no federal questions which would warrant review by this Court. Accordingly, respondents Wilson and Hayes respectfully request that the petition for writ of certiorari on file herein be denied.

DATED: November 17, 1992.

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